

No. 13013

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In the United States Court of Appeals  
for the Ninth Circuit

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THOMAS JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY  
OF ALASKA, FOURTH JUDICIAL DIVISION

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BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The district court did not write an opinion.

### JURISDICTION

This is an appeal from a judgment entered April 27, 1951, awarding the United States possession of certain property (R. 10-11). Notice of appeal was filed June 5, 1951 (R. 11-12). The jurisdiction of the district court was invoked under 28 U. S. C. sec. 1345, and the jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

### QUESTION PRESENTED

Whether the evidence presented was such that reasonable men could not differ as to the fact that the

property involved is located in Section 34, Township 2 South, Range 3 East, Fairbanks Meridian.

#### STATEMENT

On January 9, 1951, the United States filed a complaint in ejectment against Nell Kelly and Thomas Jones, seeking the immediate possession of the NW  $\frac{1}{4}$  Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, containing 160 acres together with the improvements thereon. The complaint alleges that the United States is now, and for more than fifty years has been, the owner in fee simple of said lands, which are embraced within a Withdrawal of Public Land in Aid of Flood Control, Alaska, by Executive Order No. 8020, dated December 2, 1938<sup>1</sup> (R. 3-4). Separate answers denying the allegations of the complaint were filed (R. 4-5, 5-6).<sup>2</sup>

Trial proceedings were had before the court and a jury, beginning on April 23, 1951. The Government's first witness, Fred J. Weiler, Manager of the Land Office, Bureau of Land Management, Department of the Interior, Fairbanks, testified that in 1943 Mrs. Nell Kelly erected a dwelling 30 by 20 feet, and later made an addition to the building, which

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<sup>1</sup> This Order was introduced in evidence and marked as Plaintiff's Exhibit "A" (R. 17-18). The printed record omitted the range number in line 9, page 18. It should read: "T. 2 So., R. 3 E., secs. 19 and 28 to 34, inclusive (unsurveyed)." 3 C. F. R., 1943 Cum. Supp. p. 437.

<sup>2</sup> The defendant Jones sought to file an amended answer showing that he entered upon the land under the terms of a lease from Nell Kelly, and that he expended approximately \$50,000 in improvements on the property. The court refused to allow the filing of the answer because it stated no defense (R. 6-8, 82-83, 96-97).



is now known as Moose Creek Lodge, on the land in question; that some time later she filed an application for this tract of land; and that in March 1948, Robert H. Casperson filed an application to contest Mrs. Kelly's claim, describing the land as the unsurveyed SW $\frac{1}{4}$  Section 27, Township 2 South, Range 3 East of the Fairbanks Meridian (R. 19-23). Mr. Weiler stated that Section 27 is immediately north of Section 34. The Government sought to prove the location of the land involved by a plat dated February 6, 1951, showing Section 34, Township 2 South, Range 3 East of the Fairbanks Meridian, and the location of the Moose Creek Lodge development as related to the preliminary field survey of Section 34. The appellant<sup>3</sup> objected to admission of this instrument on the ground that it was a sketch, not a survey, and that it was not an original nor had it been certified to be true and correct. The court sustained the objection and held that the plat would have to be proved by the surveyors who compiled it, by showing their field notes and testifying that they made the map pursuant thereto (R. 24-28). As the surveyor who made the plat was not available, the trial was interrupted while the Government had a survey made of the premises of Moose Creek Lodge showing its location according to meridian, township, range and section (R. 28-33,

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<sup>3</sup> The attorney for the defendant Kelly took the most active part in the trial and made most of the objections, but since there was no conflict between the positions of the two defendants, and Mrs. Kelly is not appealing, "appellant" is used herein even though certain motions or objections were made by the attorney for Mrs. Kelly.

42). This survey was made by Robert Lyle, of the Corps of Engineers, stationed at Ladd Field. He testified that he located Moose Creek Lodge by using as a starting point an iron post of the General Land Office, which marks the northeast corner of Section 9, Township 3 South, Range 3 East.<sup>4</sup> From this point he made measurements and observations and located a witness corner in Township 2 South, Range 3 East, Sections 28, 27, 33 and 34. From this corner he established the north and west lines of Section 34, and found Moose Creek Lodge to be a distance of 1181.70 feet south from the section line, and 812.86 feet from the west boundary line, thereby locating it well within the NW $\frac{1}{4}$  of Section 34 (R. 42-54).

The appellant objected to Mr. Lyle's testimony, and sought to prove the inaccuracy of his measurements by a plat which showed Moose Creek Lodge to be in a slightly different location within Section 34. The Government's objection to this plat was sustained, as it developed that this was the identical plat dated February 6, 1951, which the court had refused to admit as evidence on the objection of the appellant. The court examined the plat and found that the lodge was shown to be in Section 34, the section alleged in the pleadings, and stated that it was immaterial that it showed a different number of feet from one side or the other (R. 68-75). Appellant's attorney stated to the court

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<sup>4</sup> The official plat of survey of Township 3 South, Range 3 East, Fairbanks Meridian, was introduced in evidence and marked as plaintiff's Exhibit "B" (R. 34-38).



that Mr. Weiler, whom he had made his witness, had advised him that the only map in his office disclosed that the property in question is in fact in Section 34 (R. 82).

The court refused to admit in evidence a lease from Nell Kelly to the appellant, by which he sought to show that he had spent in excess of \$50,000 in improvements (R. 96-100).

The Government's motion for a directed verdict was granted (R. 102-103), and a judgment was entered on the jury verdict awarding immediate possession to the Government (R. 10-11). This appeal followed (R. 11-12).

#### ARGUMENT

#### **The court properly directed a verdict in view of the evidence in this case**

It is well settled that if the evidence in a case is "so overwhelmingly on one side as to leave no room to doubt what the fact is" the court may properly direct a verdict. *Gunning v. Cooley*, 281 U. S. 90, 94 (1930); *Brayer v. John Hancock Mut. Life Ins. Co.*, 179 F. 2d 925, 928 (C. A. 2, 1950); *United States v. Grannis*, 172 F. 2d 507, 513 (C. A. 4, 1949), certiorari denied 337 U. S. 918. Such is the evidence here.

A. *There is no question that the lodge was in Section 34.*—The Government's evidence as to the location of Moose Creek Lodge was uncontradicted. Although appellant attempted to prove that the lodge might be located a different number of feet from the section lines from that testified to by the engineer

who made the survey of the land <sup>5</sup> (R. 68-76), it was finally conceded that the only map in the office of the Bureau of Land Management showed that it was in fact in Section 34, Township 2 South, Range 3 East, Fairbanks Meridian (R. 82). Appellant further concedes (Br. 8) that Nell Kelly and the appellant were on Section 34. The record reveals no evidence that the lodge was not located in Section 34.

Section 34, Township 2 South, Range 3 East, Fairbanks Meridian was not open to settlement at the time Mrs. Kelly entered the ground in 1943 (R. 23), having been withdrawn in aid of flood control by Executive Order No. 8020 in 1938 (R. 17-18). The fact much emphasized by appellant that Mrs. Kelly thought her claim was on the SW $\frac{1}{4}$  of Section 27, Township 2 South, Range 3 East, Fairbanks Meridian (R. 7, 22), gives her no vested right in Section 34 as against the United States. Although her claim was initiated by actual settlement on the ground and notice of that settlement was recorded in the United States Commissioner's office (R. 23), there is nothing in the record to show that she had paid for the land and obtained a receipt from the proper land officer for the purchase price, which would have been necessary to obtain a vested right, if the section were open for settlement. "Until this has been done it is competent

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<sup>5</sup> Mr. Lyle stated that as a result of his measurements and computations, the northwest corner of Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, is within the limit of about one in five thousand feet, so that if his computations were incorrect to that extent, Moose Creek Lodge would still be about 1,100 feet south of the boundary line of Section 34 (R. 63-64).

for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler.”<sup>6</sup> *Russian-American Co. v. United States*, 199 U. S. 570, 577–578 (1905); see also *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1917). Appellant’s argument that Nell Kelly made a lawful entry upon the land with the consent and approval of the Bureau of Land Management (Br. 6)<sup>7</sup>, hence was not a trespasser, is without merit. “As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. \* \* \* A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.” *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409 (1917). See also *United States v. San Francisco*, 310 U. S. 16, 31–32 (1940); *United States v. California*, 332 U. S. 19, 39–40 (1947); *Federal Crop Ins. Corp. v. Merrill*,

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<sup>6</sup> Public Land Order 577, March 29, 1949, 43 C. F. R., 1950 Supp., 150, is an order withdrawing public lands for use of Department of the Air Force as an air force base. Section 34, Township 2 South, Range 3 East (unsurveyed), Fairbanks Meridian, was included in the withdrawal order, subject to Executive Order No. 8020.

<sup>7</sup> If appellant’s lessor, Mrs. Kelly, was advised that the SE $\frac{1}{4}$  of Section 27, Township 2 South, Range 3 East, Fairbanks Meridian, was open for location, as contended in the brief (p. 5), her location as she believed in the SW $\frac{1}{4}$  of such section was without the consent and approval of the Bureau of Land Management.

332 U. S. 380, 384 (1947). Thus, the evidence is uncontradicted that Moose Creek Lodge was located in Section 34, and that that section had been validly withdrawn from entry in 1938. On these facts the court had no alternative but to direct a verdict for the United States.

*B. Other considerations relied upon by appellant are irrelevant and present no defense to the action.*—Appellant's argument that demand to vacate the premises was a prerequisite to instituting suit against him (Br. 6) must fail. No demand was necessary, and the filing of the complaint in ejectment was sufficient notice. No relationship of landlord and tenant existed between the United States and appellant, nor was the lessor in the lease under which he occupied the premises in privity of title with the United States. Moreover, this defense comes too late, having been made for the first time in the brief in this Court. Appellant, "therefore, waived all defenses which he did not present by motion or answer, except failure to state a cause of action or lack of jurisdiction of the subject matter." *Carter v. Powell*, 104 F. 2d 428, 430 (C. A. 5, 1939), certiorari denied 308 U. S. 611; *E. I. Du Pont De Nemours & Co. v. Martin*, 174 F. 2d 602, 605 (C. A. 6, 1949); Rule 12 (h), Federal Rules of Civil Procedure.

Appellant was not prejudiced by the court's denial of his motion to file an amended answer, as contended (Br. 3). The answer (R. 6–8) shows the property to be located in Section 27, but that cannot be construed as evidence of its real location, particularly when the answer states that the lease under which appellant

occupies the property erroneously described it as being located in Section 20. The amount alleged to have been expended for improvements was irrelevant to any issue before the court, since no damages were sought in this action, but merely possession of the property.

Appellant fails to point out in what respect the court erred in overruling objections to the introduction of certain testimony offered by appellee (Br. 3), but an examination of the record discloses that no prejudicial error was committed thereby.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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